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1947. **File No.** O/BECCA/47

G **BRANCH**

Subject:— Opinion offered on the Bombay Essential Commodities and Cattle (control) Act, 1946 In regard to Agricultural Machinery (control on Prices) order, 1947

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File No. O/BECCA/47

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C O N T E N T S.

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Office of the R.L.A.

Import of Milk
Bombay Essential
Commodities and
Cattle (Control)
Act, 1947.

The order passed by the District Magistrate Ahmedabad, which is intended, and for maintaining or increasing the supply or for securing the equitable distribution and availability at fair price, of milk but for preventing the spread of cholera is ultra vires the provisions of section 4(1) of the Bombay Essential Commodities and Cattle (Control) Act, 1946.

Sd/-P.M.Lad
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Remembrancer of Legal Affairs.

U.R. to C.S.D. No. 9846, dated the 13th October 1947.

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The question raised for the consideration of the R.L.A. are whether Messrs. Turner, Hoare & Co. Ltd., Engineers, Bombay, are mere bailees of the oil engines imported by them against the orders booked long prior to the Freezing Order and if so whether the delivery of the oil engines to the respective purchasers would be in contravention of the Freezing Order.

It is an undisputed proposition of law that if a seller of goods continues to be in possession after sale, he is a bailee of the goods for the purchaser; but to constitute Messrs. Turner, Hoare & Co. Ltd., Engineers bailees as contended what is essential is that the property in the oil engines must have passed to the purchasers. Under section 6(3) of the Indian Sale of Goods Act, 1930, whereby a contract of sale, the seller purports to effect the present sale of future goods, the contract operates as an agreement to sell the goods. "Future goods" as defined in section 2 sub-section (6) means goods to be manufactured or purchased or acquired by the seller after making of the contract of the sale. It is, therefore, apparent that the Company by accepting the orders of its customers for oil engines entered into contracts for a present sale of future goods and these contracts were mere agreements to sell those engines within the meaning of section (6) sub section (3). Under sub-section (3) of section 4 where-under a contract of sale, the property in the goods is transferred from the seller to the buyer, the contract is called a sale. Section 23 sub-section (1) provides that where there is a contract for the sale of unascertainable or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract

either by the seller with the assent of the buyer or by the Buyer with the assent of the seller, the property in the goods thereupon passes to the buyer and such assent may be expressed or implied and may be given either before or after the appropriation is made. "When, however, the goods to be delivered under the contract have been indentified in a manner binding on the parties, as the goods or which the contract is to attach, and therefore as the goods in which the property is to be transferred to the buyer, and nothing further remains to be done to pass the property, the property may, and, in the absence of a contrary intention, will pass; nor does the fact that the seller intimates that he will not deliver, or refuses to deliver, except on payment of the price, of itself displace the presumption; for, as has already appeared, the right of the seller to retain possession of the goods until payment is quite consistent with the change of property. (See Mulla's Indian Sale of Goods, Act, 1930, page 124). In the present case the Company ordered from abroad the oil engines against orders booked with full deposite long before the Freezing Order was passed by Government. Some of these orders were booked so far back as 1945 and some in 1946. The list of Orders supplied by the Company shows that the oil engines bearing certain specific Nos. are entered against the respective purchasers. It follows, therefore, that the oil engines have been indentified and have been clearly appropriated towards the contracts entered into by the Company for the Supply to their customers. Since these oil engines have been indentified and the full deposits have been received by the Company and the purchasers ever since the arrival of the engines have been clamowing for their delivery, there appears to be a clear case of

appropriation of the oil engines within the meaning of section 23(1) of the Indian Sale of goods Act, and consequently the property therein has passed to the purchasers. The fact that actual delivery has not taken place and that in some cases full price has not been paid would not militate against the passing of the property in the oil engines to the purchasers. It is presumed that the oil engines arrived in Bombay before the date of Freezing Order, that is to say, before 30th September, 1947. If so, on the date of that Freezing Order the property in the oil engines had already passed to the purchasers and the position of the Company was merely that of a bailee.

The next question for comsideration would be whether the Freezing order No. 410-B-IV dated 30th September 1947 prohibits the Company as bailee to deliver the oil engines to the purchasers. That Freezing Order directs that no person shall sell, give or hire, or otherwise dispose of any of the oil engines having a H.P. of 5 and over but not exceeding 60 without the previous permission in writing of the Director of Civil Supplies, Bombay. If the Company as bailee transfers the oil engines to the purchasers it would amount neither to any sale nor hire. The words "dispose of" in the Order are to be read ejusdem generis with the previous words "Sell, give on hire". As bailee the Company holds the engines at the risk of the purchasers, the ownership having already vested in the purchasers, That being so, the transfer of oil engines by the Company as bailee to the purchasers would not amount to a disposal of the oil engines within the meaning of the Freezing Order. In the circumstances it appears that Freezing Order does not apply to the oil engines in possession of the Company.

Sd/-P.M.Lad
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Remembrancer of Legal Affairs.

U.R. to C.S.D. No. 11396 dated 28-11-47

Question No. 1:- In the case of sale of unascertained goods what is necessary to determine whether the property in the goods has passed is the appropriation of the goods to the contract either by the seller with the assent of the buyer or by the buyer with the assent of the seller; (see section 23(1) of the Indian Sale of Goods Act). If the articles have arrived after the Freezing Order came into operation, there could arise no question of such appropriation for, the Freezing Order would arrest such appropriation. Consequently the property in such goods not having passed by the time the Freezing Order came into operation, they would be governed by the Freezing Order.

Question No. 2:- The payment of earnest money is intended to signify the conclusion of the contract: (see section 78 of the Indian Contract Act). Section 55(1) of the Indian Sale of Goods Act provides:

> " Where under a contract of sale the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may sue him for the price of the goods".

It follows, therefore, that although the delivery of goods and the payment of price are concurrent conditions under section 32, it would still be possible that the parties may agree to the payment of the price even after the transfer of the property in the goods. As stated above what is material in the case of sale of unascertained goods is the appropriation of the goods to the contract to complete the transfer of interest in the goods. In cases where the purchaser has made no deposit with stockist but has only placed a written order for an engine and the stockist has accepted it against future arrivals,

the transfer of property in such engines would be determinable on the terms of the contract. If the contract allows appropriation irrespective of the payment of the price and if such appropriation is made, the property in the engines wouldpass to the purchaser but not otherwise.

Question No. 3:- This question is already covered by question No.2 Whether a deposit is made as earnest money or as part or full payment of the price agreed to would be one of the considerations to determine the appropriation of the goods to the contract but by no means would such deposit be the only way of ascertaining the appropriation of the goods to the contract.

Question No. 4:* In his last opinion the R.L.A. held that the stockist held the engine as bailee at the risk of the purchaser. This statement rests in the provisions of section 26 of the Indian Sale of Gods Act. By way of amplification it may be stated that if the property has passed and the goods remain in possession of seller and are accidentally destroyed without his fault, he is not liable to an action for a ~~break~~ breach of contract in not delivering them; (see Mulla's Sale of Goods Act, Page 151). It appears that from that statement of the R.L.A. the Deputy Director of Civil Supplies appears to infer that the stockist holds the engine at the risk of purchaser so far as the risk of price fluctuations is concerned. This is not a correct inference. The risk is not the risk of price fluctuations but of damage to the property transferred to the purchaser though remaining in possession of the seller.

Question No.5. The Agricultural Machinery (Control of Prices) Order was passed on 21st November 1947. Apparently that order will apply to sales of engines made after the

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promulgation of that order but to sales made before the promulgation of that order.

Sd/* P.M.Lad
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U.R. to C.S.D. No. G 113 , dated the 8th December 1947.

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